

STATE OF MICHIGAN
COURT OF APPEALS

KATHERINE HEYS,

Plaintiff/Counter-Defendant-
Appellant,

v

BUTZEL LONG, P.C.,

Defendant/Counter-Plaintiff-
Appellee.

UNPUBLISHED

January 20, 2011

No. 293666

Kent Circuit Court

LC No. 07-010317-CZ

Before: MURRAY, P.J., and HOEKSTRA and SERVITTO, JJ.

PER CURIAM.

Plaintiff's delayed application for leave to appeal challenged two orders of the trial court: (1) a July 31, 2008, order granting defendant's motion for summary disposition and (2) an August 4, 2009, order denying plaintiff's motion for relief from judgment. This Court granted the delayed application, and we now affirm the trial court's denial of plaintiff's motion for relief from judgment, and dismiss the appeal from the order granting defendant's motion for summary disposition because we lack jurisdiction to review that order.

I. UNDERLYING SUBSTANTIVE FACTS

Plaintiff hired defendant, specifically attorney Mark Nelson, to represent her in a claim of undue influence relating to her deceased grandfather's estate. During the estate litigation, many of the parties entered settlement negotiations and ultimately signed a settlement agreement. Outside of those negotiations, plaintiff claims that her father promised her membership on a family foundation, the sum of \$1,000,000, and half of what he would receive from the grandfather's estate if plaintiff would sign the settlement agreement with the estate. There was no written documentation of those promises to plaintiff.

Plaintiff alleges that she instructed attorney Nelson to make certain all of her father's oral promises were enforceable if she were to sign the settlement agreement. On October 13, 2005, attorney Nelson attended a court-ordered settlement conference, and signed the settlement agreement on plaintiff's behalf.

Among the settlement provisions, plaintiff's father was to pay plaintiff and her sister \$250,000. The settlement stated nothing about any of the other promises allegedly made by

plaintiff's father. Additionally, the settlement included an integration clause stating that the settlement constituted the entire agreement between the parties and superseded all contemporaneous oral agreements. The settlement also stated that the parties were not relying on any other statements, representations, or promises.

In the case at bar, plaintiff claims that defendant committed legal malpractice by making or permitting her to become a party to the settlement when doing so caused her to forego all claims against her grandfather's estate and against her father related to his alleged promises as an inducement to sign the settlement. Plaintiff's complaint stated that she sustained damages in the amount of \$1,275,000 because she could not bring a claim against her father. Plaintiff also stated that her grandfather promised her \$4,000,000, and her claim of undue influence in the estate litigation would have proved that.

Plaintiff filed her legal malpractice case in October 2007. Defendant filed a motion for summary disposition on June 23, 2008, claiming plaintiff failed to show that its actions were a proximate cause of her claimed injury. Additionally, defendant argued that there were no material issues of fact showing that the alleged misconduct proximately caused plaintiff to sustain actual injury.

The trial court granted defendant's motion for summary disposition, ruling that the issue surrounding the oral promises from plaintiff's father was not the case within the case. Rather, only plaintiff's undue influence claim in the estate litigation matter was the case within the case. The trial court noted that the probate court decided there was no undue influence in the estate litigation. For that reason, and by order entered on July 31, 2008, the trial court granted defendant's motion for summary disposition because plaintiff could not show that defendant's conduct was the proximate cause of her injury.

II. PROCEDURAL FACTS

As noted, the trial court's order granting defendant's motion for summary disposition was entered on July 31, 2008. On August 21, 2008, plaintiff filed an application for leave to appeal the July 31, 2008 order, which was assigned Docket No. 287234 in this Court. At that time, defendant law firm's counter-claim for unpaid attorney fees remained pending. This Court denied plaintiff's interlocutory application for failure to persuade the Court of the need for immediate appellate review. *Heys v Butzel Long PC*, unpublished order of the Court of Appeals, entered January 6, 2009 (Docket No. 287234).

According to plaintiff, at the May 6, 2009, pretrial conference, the subject of which was defendant's counterclaim, the parties agreed to dismiss the counterclaim without prejudice in order to allow plaintiff to challenge the July 31, 2008, summary disposition order in this Court by claim of right. The parties stipulated as follows:

1. The Counter-Plaintiff's claim is dismissed without prejudice or costs.
2. The Counter-Plaintiff may re-file the counterclaim after the Court of Appeals has decided the case of Katherine Heys v Butzel Long, PC.

3. In the event that Counter-Plaintiff refiles the counter complaint, the Counter-Defendant waives any statute of limitations defense that may be available to her.

Thereafter, by order dated May 13, 2009, the court effectuated the stipulation by stating, "IT IS HEREBY ORDERED as stipulated," and also provided the following statement: "This order resolves the last pending claim and closes the case."

On May 26, 2009, plaintiff claimed an appeal as of right to this Court from the stipulated order of dismissal. By order entered on June 17, 2009, the Court administratively dismissed the claim of appeal for lack of jurisdiction, explaining:

The claim of appeal filed on May 26, 2009, is DISMISSED for lack of jurisdiction because no order has been entered adjudicating the rights and liabilities of the counter claim. A dismissal without prejudice is not a final order. See *Detroit v Michigan*, 262 Mich App 542 [; 686 NW2d 514] (2004). This is especially true where there is no prohibition for reinstating the counter claim, as the only condition is that this appeal be decided first. There is no requirement that the Court of Appeals decide the appeal with any particular result. [*Heys v Butzel Long PC*, unpublished order of the Court of Appeals, entered June 17, 2009 (Docket No. 292255).]

Plaintiff did not seek reconsideration of the June 17, 2009 order or seek leave to appeal to the Supreme Court.

Instead, on June 26, 2009, plaintiff filed a motion for relief from judgment or order in the circuit court, pursuant to MCR 2.612(C)(1)(a) and (f). Plaintiff argued that relief from the stipulated order was appropriate because the parties had made a mutual mistake, in that the parties mistakenly believed that a voluntary dismissal would result in a final order that could be appealed by claim of right. She also argued that the circumstances were sufficiently unusual that notions of fundamental fairness required that relief be granted. Plaintiff asked the court to reinstate defendant's counterclaim.

Defendant responded that it made no mistake and that its counsel never represented to plaintiff that dismissing the case without prejudice would preserve her right to appeal as a matter of right. Rather, defendant offered to dismiss the suit for a number of reasons, "some of which are obvious, time and expense, some which are strategic, I believe it was in the best interest of my client to avoid trial solely on the counterclaim." Defendant asserted that plaintiff was not entitled to relief because her counsel made a unilateral mistake about the consequences of a voluntary dismissal of the action and a unilateral mistake is not ground for relief under MCR 2.612(C).

The trial court entertained arguments on the motion on July 17, 2009, and denied the motion from the bench, explaining:

And I want also to emphasize that I'm not here to characterize or dispute the characterization of either party's counsel's argument here about what they recall happening. I think this serves to highlight importantly and critically the difference in the roles of advocates and court. The judge's job, as I perceive it, is to react to those things that are presently before it, and counsel's job is to foresee in terms of the consequences of decisions made. That's why they're attorneys and counselors, because they are imbued with a responsibility to not only know what the law is, but to advise clients of what the possible outcome is of decisions that are being made.

* * *

Clearly, the use of the word "mistake" has been made. "A mistake has been made by all of us" I think was the phrase used by plaintiff's counsel, but I wasn't part of that negotiation settlement stipulation, I just ratified it. I find in many different contexts people characterize decisions made as mistakes. And here I'm not suggesting any moral fault by any means, but "mistake" has been used quite liberally to refer to acts or decisions which have perhaps unintended consequences. But there was no mistake in the decision to sign the order as it was. The anticipation was that it would have a consequence different than the Court of Appeals has interpreted. But that's the nature of lots of decisions that we make, especially in the Court context when appellate review is taken. I don't think that this was a scrivener error. I don't believe that it was the mistake which comes when names are transposed or numbers are transposed, but this was the product of decision. The fact that it had a consequence that was unexpected, I don't believe gives me the authority to reverse the decision made, and it is with humility and respect that I must deny the relief.

This bench ruling was effectuated by order entered on August 4, 2009.

III. ANALYSIS

We first address the jurisdictional issue, which was once again raised in this case, this time at oral argument before this Court, and upon which we received supplemental briefing from the parties.¹ As noted at the commencement of this opinion, we lack jurisdiction over the trial court's July 31, 2008, order because plaintiff's delayed application for leave to appeal was filed on August 20, 2009, more than a year after the July 31, 2008, order granting defendant's motion

¹ Subject matter jurisdiction must be addressed throughout the proceedings, *McFerren v B&B Investment Group*, 233 Mich App 505, 512; 592 NW2d 782 (1999), and so despite the prior grant of the delayed application we must assure ourselves that we have the power to decide this case. See *Potomac Passengers Assoc v Chesapeake & Ohio RR Co*, 520 F2d 91, 95, 95 n 22 (CA DC, 1975).

for summary disposition. We do, however, have jurisdiction to decide any proper argument about the validity of the August 4, 2009, order – the only order timely challenged by the instant application.

Both court rules and statute provide this Court with jurisdiction to hear certain appeals. MCL 600.308(1) and (2); *Chen v Wayne State Univ*, 284 Mich App 172, 192; 771 NW2d 820 (2009). Included within our jurisdiction is the ability to grant a delayed application for leave to appeal, MCR 7.205(F), but that ability is specifically limited to orders entered within the year prior to filing the application. MCR 7.205(F)(3)(b). “The establishment of a firm deadline prevents stale applications for leave to appeal; it forces the parties to raise claims of error while the participants still have a sound grasp of the facts and events surrounding the litigation.” *Chen*, 284 Mich App at 193.

As defendant argues, plaintiff’s delayed application challenged a non-final order entered on July 31, 2008, more than a year before the delayed application was filed, so we have no jurisdiction to hear and resolve the appeal from that order. MCR 7.205(F)(3)(b). And, because plaintiff’s motion for relief from judgment was not filed within 21 days of the July 31, 2008, order, the additional time available under MCR 7.205(F)(3)(b) is not available. Indeed, the remedy plaintiff had once this Court dismissed the claim of appeal on June 26, 2009, was to file the delayed application within 21 days of the order dismissing the appeal. MCR 7.205(F)(5). Plaintiff did not do so, as she instead went back to the trial court for relief from the terms of the order. Consequently, we lack jurisdiction to consider any appeal from the July 31, 2008, order.²

Finally, with respect to the August 4, 2009, order denying plaintiff’s motion for relief from judgment, plaintiff has not “primed the appellate pump”, as she sets forth no argument in her brief on appeal regarding the propriety of that order. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Accordingly, we have nothing to review.

The September 25, 2009, order granting plaintiff’s delayed application for leave to appeal is vacated, as we lack jurisdiction to consider the July 31, 2008, order. The August 4, 2009, order is affirmed.

No costs to either party. MCR 7.219(A).

/s/ Christopher M. Murray

/s/ Joel P. Hoekstra

/s/ Deborah A. Servitto

² In her supplemental brief plaintiff argues that MCR 7.205(F) does not apply because it only applies to final orders, and the July 31, 2008, order was not a final order. Although plaintiff is correct that MCR 7.205(F)(3)(a) applies a 12-month rule to final orders, plaintiff ignores MCR 7.205(F)(3)(b), which contains a 12-month rule applicable to all other orders.